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In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF OREGON

Petitioner,

v.

JAMES EDWARD BRADSHAW

Respondent.

On Writ of Certiorari to the Court of Appeals of the State of Oregon

REPLY BRIEF

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REPLY BRIEF

ARGUMENT

I

Bradshaw's arguments in favor of the so-called *per se* rule demonstrate its general unworkability as an analytical tool in confession cases.

In the first three parts of his argument, Bradshaw defends the "*per se* rule" suggested by the majority opinion in *Edwards v. Arizona*, 451 U.S. 477 (1981), and its application to this case by the Oregon Court of Appeals. Bradshaw argues that, once a suspect has asserted his right to counsel, there can be no waiver of that right unless, as a threshold matter, any subsequent interrogation is "initiated" by the suspect. In doing so, however, Bradshaw finds it necessary, or at least desirable, to define further the concept, enunciated in *Edwards*, of "initiating" conversation. He suggests a list of questions that an arrestee may ask the police without being held to have "initiated" further conversation, and he proposes that *Edwards* be "clarified" and "strengthened" by the promulgation of an elaborate code of conduct for the police to follow in dealing with an arrestee. Bradshaw's arguments in favor of the purported rule of *Edwards*

reveal the fundamental flaws of that rule.

Bradshaw proposes that "initiation" be defined to include only

> "* * * statement[s] by an accused that clearly [indicate] an intentional abandonment of the right to counsel, an assertion of competence, and a definite willingness to represent himself in discussions with authorities concerning the substantive criminal investigation." (Brief for Respondent at 11, 16).

Not surprisingly, the inquiry that Bradshaw made of Corporal Hays in this case, "What is going to happen to me now?" heads his list of specific examples of non-initiatory inquiries (Brief for Respondent at 16, Appendix A).

No one would contend that every statement or request an arrestee might make after invoking his right to counsel should be held to constitute a waiver of that right. A request to use the telephone, for example, is not normally a consent to further interrogation. However, the core issue whether a previously asserted right to counsel has been waived is not illuminated by discussing whether a particular statement "initiates" further conversation. It will not always be clear from a suspect's statement whether it was intended to elicit a specific limited response from the police or whether it was intended to reopen a prior conversation. Focusing on the seemingly mechanical inquiry of initiation soon will bog the court down in an analysis of the totality of

the circumstances to determine not whether the statements were voluntary and not whether the waiver was knowing and voluntary, but whether there was, in fact, "initiation." As Bradshaw's discussion of initiation discloses, resolution of that issue often will be difficult.

In the present case, for example, Bradshaw's question, "What is going to happen to me now?" could have been, as Bradshaw now argues, "a limited question concerning procedural aspects of detention on the alcohol charge" for which he had been arrested. It just as well might have been, as the trial court viewed it, a tentative resumption of the conversation which Hays had terminated upon Bradshaw's assertion that he wanted an attorney, "before it goes very much further." In order to determine the import of a statement, one must often look, as the trial court did in this case (J.A. 42-43; Tr. 81-82), to the "total context" in which such a statement is made.

As a practical matter, under Bradshaw's approach, the "totality of circumstances" must be considered to determine whether the suspect "initiated" further conversation; then the "totality of circumstances" must be considered to determine whether a previous assertion of the right to counsel has been waived. Regardless of the definition given to "initiation, such an approach is needlessly dupli-

cative. When coupled with Bradshaw's proposed definition of initiation, which effectively requires that the suspect's statement itself indicate a waiver, the approach would impose an insurmountable burden on the prosecution.

Attempts such as Bradshaw's to propound a universal definition of "initiation," or to categorize every possible statement an arrestee might make as "initiatory" or "non-initiatory" are misguided and bound to fail. Such definitions or lists unavoidably must be either overbroad or underinclusive. They may be drawn so restrictively that they prohibit the use of some statements which clearly were not the product of police impropriety; or they may be drawn so broadly that they fail to exclude some statements which a trial or appellate court may think suspect. As a result, the very concept of "initiation" would be distorted in the process of attempting to apply it.

In the present case, for example, it is clear that, in any ordinary sense of the term, Bradshaw "initiated" further conversation with Corporal Hays by inquiring "What is going to happen to me now?" Indeed, even before *Edwards* was decided, the trial court characterized this inquiry as "initiating" conversation. The trial court relied upon this initiation as one of several factors supporting its conclusion that Bradshaw waived his earlier request for counsel, (J.A. 42-43; Tr. 81-82), prior to the

conversation in which he agreed to submit to a polygraph examination wherein he ultimately admitted his guilt. (J.A. 42-43; Tr. 81-82). Yet the Oregon Court of Appeals, upon concluding that Hays somehow had taken unfair advantage of a fully advised defendant when he suggested the polygraph examination, held that Bradshaw's inquiry was not "initiation," within the meaning of *Edwards*.

If the "initiation" standard is as amorphous as this case proves it to be, it is no standard at all. It should be abandoned, and the "totality of circumstances test" adopted in its place.

II

Bradshaw's "totality of circumstances" analysis, largely based on matters urged for the first time in this Court, is not supported by the record in this case.

In part IV if his argument, Bradshaw purports to find, in the "totality of circumstances test," a license to raise issues that never were suggested below. He apparently theorizes that the "totality of circumstances test" entitles him to ask this Court to review *de novo* all of the circumstances surrounding his arrest and subsequent statements, whether or not any constitutional significance was placed on those circumstances below.

The short answer to this portion of Bradshaw's argument is that the court of appeals did not decide

this case by weighing the factors advanced by Bradshaw for the first time here. The court decided the case solely on the basis that Bradshaw's inquiry, "What is going to happen to me now?" did not "initiate" further conversation, within the meaning of *Edwards*. However, to dispel suspicion that we think there is any merit to the substance of Bradshaw's "totality" analysis, we note the following matters.

(A) Bradshaw asserts that his original arrest for furnishing liquor to a minor was illegal. He argues that that offense is classified as a "violation" under Oregon Law, and he observes that the Oregon statutes do not authorize peace officers to make warrantless arrests for mere "violations," not committed in their presence.

There are at least three responses to Bradshaw's argument on this point. First, the legality of his arrest was not questioned below, and this Court need not consider Fourth Amendment issues presented for the first time here. *See Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437 (1969). Second, as Bradshaw acknowledges (Brief for Respondent at 38, n. 19), whether his arrest was authorized by state law is immaterial to whether it violated the Fourth Amendment.[1] Final-

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[1]After acknowledging this, however, Bradshaw goes on to argue that

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ly, it is not at all clear that furnishing liquor to a minor *is* only a "violation" under Oregon law. The proper classification of that offense is, at most, a question which the Oregon courts have not resolved. There is no reported Oregon decision addressing whether the fact that a mandatory *minimum* sentence is prescribed for furnishing liquor to a minor by Oregon Revised Statutes (ORS) 471.410(3) precludes the imposition of a greater sentence under the general penalty provisions of the Oregon liquor laws. No Oregon appellate court has ever held that the offense is not a misdemeanor for which a warrantless arrest may be made, even when the arresting officer did not see the crime committed.[2] The Court need not and should not resolve this technical issue of Oregon law in this case.

(B) Bradshaw suggests that his arraignment on the charge of furnishing liquor to a minor was unreasonably and purposely delayed, with the objective of obtaining his confession to the homicide under investigation. Bradshaw was arraigned at

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> "The invasion of Bradshaw's personal liberty including the indignity of Officer Hays' warrantless arrest, handcuffing, probable fingerprinting, photographing, search and imprisonment in jail clothes without bail or with excessive bail dispels any notion of a valid waiver."

Quite apart from its tenuous connection with the record, this argument proves too much. If it were correct, almost no one subjected to the "indignity" of a warrantless arrest ever could give a valid post-arrest confession, under Bradshaw's view of the "totality of circumstances test."

[2]ORS 471.990(1) provides: "Except where other punishment is specifically provided for, violation of any provision of this chapter is a misdemeanor." Both the present language of ORS 471.410 and the legislative history behind the enactment of that language are unclear as to whether the mandatory minimum sentence precludes a greater sentence under this statute.

1:30 p.m. on Monday on the charge for which he had been arrested the night before (Ex. 11 at 1). He argues that this fact should be considered in determining the admissibility of his confession under the "totality of circumstances" test.

Again, no objection was made below to the alleged delay in Bradshaw's arraignment, and this Court need not address the matter here. We submit, however, that the very fact that as Bradshaw puts it, "The record is silent as to why Bradshaw was not arraigned earlier Monday morning * * * " (Brief for Respondent at 35), indicates that no arraignment issue was presented by the facts of the case. For the same reason, the record is also "silent" as to when criminal defendants in Tillamook County, Oregon, normally are arraigned and whether administration of the polygraph examination Bradshaw had agreed to take caused any delay whatever in his arraignment.

(C) In general, as the foregoing indicates, the methodology of Bradshaw's "factual" analysis is suspect. He consistently suggests the most sinister possible interpretation of the facts in the record. Where the record is silent, he implies even more nefarious doings. He draws inferences not suggested below from police reports which were admitted into evidence only during trial, not during the hearing on the admissibility of his statements, and which were

not called to the attention of the courts below in connection with the admissibility of his statements. In this way, he portrays himself as an injured and intoxicated man, helplessly held incommunicado by the police while they subtly induced him to abandon his request for counsel, to submit to a polygraph examination, and ultimately, to confess. This is not the record before this Court.

We cannot detail all of Bradshaw's factual distortions and errors in this reply brief, but the following examples are typical.

(1) Bradshaw suggests that he is "an apparent alcoholic" (Brief for Respondent at 11, 44), whose ability to cope with the police was impaired by the injuries he received in the accident under investigation and by the fact that he "had been drinking all day preceding the Sunday [night] interrogation" (*Id.* at 44). To the contrary, the only evidence of alcoholism is the fact that Bradshaw had been drinking heavily on the day of the accident, both before and after it occurred. Moreover, he affirmatively told Hays that he was not under the influence of alcohol at the time of the interview and that he had consumed only three or four 16-ounce containers of beer that day (J.A. 47-48; Ex. 2 at 3-4). The only evidence regarding Bradshaw's injuries is that he had been treated at a local hospital for his injuries and released. During the interview with Hays, he made

no complaint of any present discomfort from the injuries he had received the night before.

(2) Bradshaw complains that he was not immediately provided an attorney or an opportunity to contact one. However, Bradshaw's "request" for an attorney was made some time after 8 o'clock on a Sunday night (*see* J.A. 45; Ex. 2 at 1). It is not clear how immediately an attorney must be made available to someone who indicates that he wants one, "before it goes very much further." In any event, the trial court was entitled to find, and did find, that on the way to the county jail, Bradshaw changed his mind, of his own volition, about talking to the police before conferring with counsel. Furthermore, Corporal Hays indicated in his testimony that a telephone was available to Bradshaw at the county jail, but Bradshaw apparently did not know an attorney whom he might contact (J.A. 18; Tr. 24). Nothing in the record indicates that Bradshaw ever requested that the police immediately contact an attorney on his behalf.

(3) Bradshaw suggests that he never was given the opportunity to telephone his grandmother. He asserts that when the police contacted her on his behalf, they did not fairly apprise her of Bradshaw's situation, but rather allowed her to abandon him to their mercies by leaving town as she had planned. The record is to the contrary. It is not at all clear

that Bradshaw's expressed desire "to get a hold of" Irma Stockdale—who, incidentally, is *not* his grandmother (*see* J.A. 62-63; Ex. 2 at 17)—was anything more than a request that she be notified of his arrest. The record is silent as to the precise content of the conversation between Mrs. Stockdale and the police. On this record, it is impossible to discern the evil motives which Bradshaw attributes to the police or the coercive consequences of their alleged strategy.

In short, contrary to Bradshaw's distortion of it, the record in this case shows that Bradshaw's rights were scrupulously honored by the police, from the time he was first interviewed at the Rockaway police station as a possible suspect in the homicide under investigation, through the administration of the polygraph examination and his subsequent confession. He was advised of his *Miranda* rights at the police station, even though he was also told he was free to leave at any time. He was readvised of those rights when he was formally arrested for furnishing liquor to a minor. He again was reminded of his rights when he asked what was going to happen to him, and he acknowledged that he understood his situation. He was readvised of his rights the next morning, prior to the administration of the polygraph examination he had agreed to take the night before. The trial court disbelieved Bradshaw's

claim that the polygraph examiner induced him to confess by telling him that the police could "break down" his story. There is nothing in the record to indicate that the dialogue between Bradshaw and the police was anything other than the casual, wide-ranging conversation described by the police and corroborated by the tape-recorded interview between Bradshaw and Hays. Nor is there anything to indicate that Bradshaw comported himself in any way other than as the cooperative, concerned innocent person he professed to be during the interview with Hays, on the way to the county jail, and at the time the polygraph was administered. Bradshaw's confession, upon being told—apparently in response to his own inquiry about either the polygraph machine or the examination—that the polygrapher thought he had been untruthful, was not the product of a will overborne by police disregard of his rights. Under any reasonable application of the "totality of circumstances" test, his confession is admissible.

CONCLUSION

For the above reasons, as well as those previously stated in our opening brief, the judgment of the

Oregon Court of Appeals should be reversed and this case remanded for further proceedings.

Respectfully submitted,

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